

# COURTHOUSE NEWS

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A Summary of Topical Highlights from decisions of the  
U.S. District Court for the District of Oregon  
A Court Publication Supported by the Attorney Admissions Fund  
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## Workers' Comp

Plaintiffs Estate of Willard Sworden and Scott Sworden, the son of decedent Willard Sworden, brought tort claims against Willard Sworden's former employer Reynolds Metals/Alcoa, Inc., and the employer's workers' compensation insurer ESIS, contending that the employer negligently caused Willard Sworden's death caused by bladder cancer allegedly due to workplace exposure to coal tar pitch. Plaintiffs brought separate claims against the employer and ESIS for conspiring to deprive plaintiff of a workers' compensation remedy by denying his workers' compensation claim and depriving him of a tort remedy by later accepting the claim after his death. Defendants moved for summary judgment based on the sole issue of workers' compensation exclusivity. Resolution of the issue required the analysis of the Oregon Constitution's remedies clause found in Article I, section 10, and of Smothers v. Gresham

Transfer, Inc., 332 Or. 83, 23 P.3d 333 (2001) which allowed certain workers' compensation claimants with denied claims to bring a civil claim for negligence in spite of the exclusivity provision of the workers' compensation laws. Judge Hubel concluded that plaintiffs failed to show a violation of the remedies clause because the first part of the remedies clause analysis requires that the current claim be one existing at common law at the time of the drafting of the Oregon Constitution and plaintiffs could not show that a statutory wrongful death claim, an employer's liability law claim, or their particular breach of fiduciary duty and fraud claims, existed in 1857. He also rejected plaintiffs' argument that Oregon law is unsettled regarding the existence of a common law wrongful death tort and noted several Oregon cases holding the contrary. Accordingly, he granted defendants' motions for summary judgment.

Estate of Willard Sworden v. Reynolds Metals Co., CV-04-

1048-HU  
(Opinion, June 8, 2005)  
Plaintiffs' Counsel: Peter Hansen  
Defense Counsel: Michael Sandmire

## Discovery

The plaintiff in a "failure to reemploy" action offered to submit to a psychological independent medical examination if the defendant's examining psychologist allowed a recording of the examination; or consented to the presence of a witness during the examination; or submitted her notes to plaintiff for approval for accuracy. The plaintiff also moved the court to prohibit the use of the Minnesota Multiphasic Personality Inventory as part of the evaluation process. Judge Ashmanskas denied the plaintiff's requests and conditions.

McKay v. Albertson's, Inc.,  
CV 04-1569-AS  
(Ruling, July 8, 2005)  
Plaintiff's Counsel: Shelley Russell

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Defense Counsel: Richard Meneghello

### NEPA

The peregrine falcon was removed from the list of endangered species in 1999 after making a remarkable recovery. US Fish and Wildlife issued a Finding of No Significant Impact allowing a 5% take of nestling peregrines in the western United States. The Audubon Society challenged this decision, fearing that the population growth since delisting was not as large as USFS believed. Judge King granted summary judgment dismissing plaintiffs' Migratory Bird Treaty Act and NEPA claims.

Audubon Society of Portland v. United States Fish and Wildlife,  
CV 04-670-KI

(Opinion, July 21, 2005)  
Plaintiff's Counsel: Daniel Rohlf  
Defense Counsel: Steve O'Dell

### NEPA/NFMA

Plaintiff League of Wilderness Defenders – Blue Mountain Biodiversity Project (LOWD) filed this action alleging that the United States Forest Service violated the National Environmental Policy Act and the National Forest Management Act in developing and approving the Final Environmental Impact Statement for the Metolius Basin Forest

Management Project on the Sisters Range District of the Deschutes National Forest. The parties filed cross motions for summary judgment, and intervenor-defendants Friends of the Metolius and Sisters Forest Planning Committee filed memoranda in opposition to LOWD's motion for summary judgment.

Judge Ashmanskas denied LOWD's motion and granted the Forest Service's motion on the grounds that LOWD lacked standing to pursue the action. Specifically, LOWD had failed to present affidavits or other evidence showing that any of its members had suffered an injury in fact.

LOWD presented a declaration by Karen Coulter, the Co-Director of the Blue Mountains Biodiversity Project, stating that she has spent time recreating in the Metolius Project area and she is concerned about the impact of the Metolius Project on old growth habitat, larger trees, water quality, and Peck's Penstemon in the Metolius Basin. The court held that this averment did not satisfy the injury in fact requirement.

The court also ruled in favor of the Forest Service on the substantive issues raised by the summary judgment motion.

League of Wilderness Defenders – Blue Mountain

Biodiversity Project v. Bosworth et al.

CV 04-405-AS

(Opinion, July 27, 2005)

Plaintiff's Counsel: David A. Stewart

Defendants' Counsel: Jeffrey K. Handy

Intervenor-Defendants' Counsel: Josh Newton

### Subject Matter Jurisdiction

Plaintiff Western Radio Services brought a complaint for declaratory and injunctive relief pursuant to § 252(e)(6) of the Telecommunications Act of 1996. Judge Aiken granted defendants' motion to dismiss plaintiff's third amended complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Judge Aiken denied defendant's motion pursuant to 42 U.S.C. § 1988 to recover their reasonable attorney fees and costs.

Western Radio Services v. Qwest Corp. et al.,

CV 05-159-AA

(Opinion July 25, 2005)

Plaintiff's Counsel: Marianne Dugan

Defense Counsel: Gregory Monson and Michael Weirich